However, that is not sufficient. The public also may have reason to worry about inherent biases creeping into other content-related decisions related to the Internet gateway. For example, what information sources and points of view receive priority? What information is blocked (or made more difficult to find) by default features, and how easy is it for the typical user to override the defaults? How is the preferred search engine designed? What content does it pull first, and what does it fail to identify at all? What other issues, impossible to anticipate today, may come to the fore in the future?

These are not matters that the government can regulate, nor should it. But the only check on this problem ever becoming serious is to ensure from the beginning that the end user always has an ability to access multiple independent ISPs on reasonable terms and conditions over the same broadband pipe. It is easier to protect the diversity we enjoy today than it would be to address information concentration problems that might otherwise develop in the future. The answer here, as elsewhere, is to preserve an "Open System World" for the use of advanced broadband telecommunications capability.

III. LAST MILE LOOP CONCENTRATION PRESENTS A DIRECT THREAT TO CONSUMER CHOICE.

A. Loop Owners Will Have Strong Incentives To Favor Their Own Affiliated ISPs To The Detriment Of Independent Firms.

The Notice of Inquiry recognizes that most ISPs will depend upon the last mile facilities of other parties. It then asks whether "the holders of the last

miles" are likely to have "the ability and incentive to discriminate against all ISPs or in favor of their own ISP operations, to the detriment of consumers." 14/

The answer to this question for the future can be found in the experience of the past. Throughout the long history of the telecommunications industry, the local loop has always been the historic source of bottleneck monopoly power. Most notoriously, the Bell System abused that power to bar or seriously disadvantage competitors. These practices ultimately resulted in the forced divestiture of the local Bell operating companies, prohibitions on the BOCs' participation in long distance and other non-local exchange lines of business, and implementation of equal access rules for long distance service use of the local network. 15/

The last mile problem does not end there. More recently the ILEC's control of the wireline loop has been the center of problems in creating local telephone competition. 16/ The cable industry has insisted on the right to control use of its local plant, with only regulatory intervention in the form of local origination and must carry access rules providing a means for non-affiliated parties

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14/ Notice at para. 79.

15/ See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) ("AT&T Decision").

16/ Many provisions of the Telecom Act, and in particular Sections 251 and 252, are aimed at creating access to the local loop so that competition can proceed notwithstanding the ILEC's continuing ownership of that facility. There is no need to review for this Commission all of the continuing issues and problems that have arisen over implementation and enforcement of these provisions.

to reach consumers with their own programming. 17/ And in the wireless arena, the FCC has found it necessary to require wireless loop operators to make capacity available to unaffiliated vendors in order to promote competition. 18/ In short, ownership of the loop conveys market power -- and last mile owners always try to exploit this power to maintain customer control. Loop owners have never shown themselves willing to give competing service vendors reasonable and non-discriminatory access to their facilities (and to the end users served by those facilities) without regulatory intervention.

As discussed in Section I above, ISPs have been insulated from these problems to date because customers have been able to reach them on a dial-up basis over today's circuit-switched network. 19/ But such access will not be adequate as telecommunications evolves to "always on" packet-switched technology. Loop owners can be expected to offer end users Internet access along with other services, and will not have an incentive to cooperate with competing ISPs. There are many ways that they potentially could deny independent ISPs the practical ability to serve end user customers. Some loop owners may simply refuse to connect with unaffiliated ISPs. Others may offer to do so in principle, but charge unreasonable

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17/ See, e.g., 47 U.S.C. §§531-32, 534.

18/ See, e.g., PCIA, WT Docket No. 98-100, FCC 98-134 (July 2, 1998); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd 18455 (1996), aff'd Cellnet v. FCC, No. 964022 (6th Cir. 1998).

19/ Similarly, regulatory rules today prevent ILECs from refusing to sell dedicated access between a large business location and an ISP.

interconnection or transport fees that bear no relationship to their costs. Discrimination also could occur in the relative speed with which customers are connected to ISP vs. affiliated Internet access services, in the use of customer information for marketing (such as loop owner use of customer data to support "win back" marketing when a customer chooses an independent ISP), and other factors. 20/

The danger for consumers is that their choices for ISP could concentrate down to the very small number of companies operating broadband local loops to their home or office location. There might be the ILEC and its affiliated ISP. Instead, or in addition, there might be the cable company and its selected ISP offering. At some point in the more distant future there may be a third last mile facility in certain locations. But it is simply not conceivable that the number of loop owners will approach the number of ISPs that consumers can select among today.

In the end, then, customers could end up with as few as one broadband option for ISP service, and at most only as many ISP options as there are broadband loop owners positioned to serve their premise. Consumers thus would be denied the benefits of innovation and competition, including competition in support services, that they enjoy today. And the nation would face new information

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20/ The Commission is familiar with these and other areas of potential discrimination from its activities to promote telecommunications competition in the past. The ILECs already have demonstrated in one form or another most of the ways that they can exploit their control of the local loop to favor their own services and discriminate against competitors. The only issue is how those problems will arise as loops become broadband.

diversity issues to the extent that this single loop owner, and perhaps its one or two competitors, had disproportionate control over the gateways to the Internet. This result would deny the potential of the Internet, and violate the pro-competitive statutory mandates of Section 706.

B. The Commission Does Not Need to Award Bottleneck Market Power to Encourage Local Broadband Investment.

Last mile owners respond by arguing that they require special incentives to upgrade their local plant for advanced telecom capability. ILECs, for example, claim that in exchange for deploying broadband loops they should be excused from the obligation to offer unaffiliated parties the practical ability to use those loops to sell competing services to customers. 21/ They may argue for the absolute right to deny others access to their broadband capacity. Alternatively, they may argue for the right to discriminate against competitors with regard to the terms and conditions of such access, which would have the same anti-competitive effect.

MindSpring strongly rejects these absurd arguments. First of all, we and other ISPs are eager to become paying customers for high speed broadband loop facilities. Collectively we have many millions of customers that we will encourage and help migrate to broadband connectivity. In an ordinary market our unfilled

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21/ The RBOCs already have tried to argue these themes in support of full deregulation of their data-based networks and services. The Commission properly rejected these unfounded legal and policy arguments. See Wireline Services NPRM, Section V.

demand would itself act as a strong incentive to upgrade local networks. It is telling that last mile firms have disregarded ISP interest, even as the accelerating Internet revolution has itself exploded demand for high speed connectivity. The only answer is that last mile owners do not want to upgrade their loops until they are ready to use them for their own Internet services (slowing service innovation for consumers), and unless they can exploit the bottleneck power they derive from those loops (as monopoly vendors).

Second, and in any event, if it makes economic sense to convert a last mile loop to high speed data functionality for the loop owner's own services, then there is no reason that another vendor should not be able to purchase the use of that loop on the same terms and conditions. MindSpring and other ISPs are fully prepared to pay for last mile connectivity on a reasonable and non-discriminatory basis that adequately compensates the last mile owner. To the extent that loop owners contend that this is not enough, they are only asking for the ability to exploit their market power to derive monopoly rents from consumers.

Indeed, if the last mile loop market were competitive, one would expect operators voluntarily to build broadband networks quickly, and to make such facilities as open as possible. They would want as many service vendors as possible working to fill up their pipes. By analogy, in the interexchange market network operators compete vigorously to design and sell carrier's carrier products to build use of their facilities. As a result, long distance market entry barriers have been low, and customers have benefited with lower prices and better services.

In the absence of similar market forces at the loop level, it becomes all the more important for the Commission to ensure that last mile owners support an "Open System World" rather than favor their own affiliates. They can be compensated fairly for upgrading their local plant to two-way high speed functionality. That is incentive enough.

C. Last Mile Broadband Facilities Competition Will Not Arrive Anytime Soon.

The Commission also is likely to hear a second theme from the incumbent last mile owners: that no regulation is needed to achieve "Open Systems" because the last mile will be competitive. 22/ The reality is completely different, particularly for the residential and small business markets. For the foreseeable future the only two paths that will be viable for upgrade are the ILEC line and the cable wire. As a result, very few premises will have more than a single broadband, two-way loop option; at most they will have a second choice.

MindSpring does not state this fact with any pleasure. We actively investigate other possible last mile options such as wireless, satellite, and electric utility wires. The unfortunate truth is that none of these technologies are close to offering a viable broadband, two-way, alternative last mile for advanced services. Some of them depend upon a dial-up return path which by definition fails to meet

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22/ The RBOCs requested such treatment before they have deployed any broadband loops. The Commission was absolutely correct to deny them forbearance from regulation. See Wireline Services NPRM, Section V(B).

demand for two-way broadband and "always on" service applications. These technologies are not competitive with connectivity that will be possible over wireline facilities, and they will not keep pace with applications made possible over high speed wire. MindSpring is not suggesting that wireless may not meet certain specialized requirements, particularly in the large business market. 23/ We also concede that eventually technical obstacles may be overcome such that customer premises will be served by enough different last mile facilities to consider that market competitive. But our point is that this day will not come in the next five to ten years, and in the meantime Americans cannot be left without competitive choice.

For that matter, it is not even clear how many customer premises actually will be served by more than one broadband pipe. It may prove out that the cable plant is substantially better suited to serve residential locations, and the ILEC plant more suitable to upgrades in business centers, with little overlap between the two. The Commission will need to look past the vaporware of press releases and examine actual deployment experience.

For present purposes, however, this question is not so relevant. Either way the market for last mile broadband facilities will be highly concentrated -- typically a monopoly or a duopoly. If the Commission allows those loop owners to

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23/ Wireless services, despite their flaws, may also have a place in rural areas where it is not economical to upgrade wireline plant. Our point, however, is that where wireline broadband is deployed, it alone will be able to meet the true demands for two-way high speed service.

favor their own ISP affiliates, it will set the stage for an equally concentrated market for Internet-related services. Last mile owners will stand as gatekeepers between their end users and any ISP that wants to offer customers a better or different product. 24/ Such a tragic outcome would violate both the vision of Section 706, and the potential of the Internet. 25/

IV. THIS PROCEEDING SHOULD CONSIDER ALL OPTIONS FOR PRESERVING LOW ENTRY BARRIERS AND MAXIMIZING CONSUMER ISP OPTIONS.

MindSpring does not purport to have the perfect solution to these issues today. Our primary concern is that this NOI proceeding start from the cornerstone principle of preserving an "Open Systems" World -- and a realistic appreciation of how next generation local networks can either advance or conflict with that objective. Beyond that, we look forward to a wide-ranging public discussion of the potential concentration problem. Every option should be reviewed

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24/ There is a potential analogy to the role that cable operators play in deciding which new program services succeed based on carriage decisions. One can envision an environment in which any new packet-switched application developer would have to go hat in hand to the last mile vendor and convince that vendor to offer the application bundled with local exchange and other services. If enough loop "gatekeepers" to the overall universe of customers are not willing to allow access (on reasonable terms), then the application will die.

25/ The focus here has been on connections between an ISP and its local customer. A separate issue exists regarding the terms under which a broadband loop owner will allow third parties to terminate communications to their customers. The Commission has recognized the terminating access bottleneck problem in the context of conventional communications services, but the same problem will exist with respect to broadband services as well.

through the prism of how best to ensure consumer choice and information diversity in the future.

That said, it is possible to catalog some of the potential tools for consideration. The options set forth below are not mutually-exclusive, and some combination may be the best result. Furthermore, we recognize that different tools might be appropriate for different categories of last mile operators. We leave aside for the moment the scope of the Commission's jurisdiction today and whether new legislation might be required. In general MindSpring believes that the Commission's current statutory authority is quite flexible when it comes to new broadband facilities and services. However, we agree with the recent OPP Report that more thinking is necessary on the question of how best to harmonize and tailor the appropriate regulatory principles to maximize competition for end users. 26/

A. Structural Separation or Absolute Line of Business Restrictions.

Stepping back, the starting place for consideration of how to promote "Open Systems" for broadband lies in the remedies developed in the past to deal with bottleneck power over the narrowband loop. For example, in principle one possible answer could lie in structural restrictions that separate local facilities ownership from the provision of advanced packet services over such facilities. The Bell System twice was made subject to prohibitions on its participation in certain industry segments where its control of the local loop was found to give it undue

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26/ Internet Over Cable, supra, at Section VII.

influence. The first was in 1956, when an AT&T consent decree barred the Bell System from engaging in any business other than the provision of common carrier communications services. 27/ Then in 1982 the second AT&T consent decree barred the BOCs from providing interLATA long distance and information services and established long distance equal access. 28/ Similarly, regulatory rules historically prohibited LECs from providing cable television services based on concerns over how they might exploit their local plant to block competition. 29/

By analogy, one option for preserving competition in Internet access and other packet-switched applications would be to prohibit some last mile loop vendors from providing such services themselves, either directly or through an affiliate. In that event the incentives of the last mile company would change 180°. Now the broadband loop owner would have an incentive to make its facilities as "open" as possible so that end users would be able to reach as many Internet services vendors as possible. The loop owner could receive compensation for the use of the broadband facility as it does today: from the end user, the Internet vendor, or a combination of the two.

This course would most completely reduce the ability of the loop owner to dominate and eliminate competitive Internet services vendors from the

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27/ See AT&T Decision, supra, 552 F. Supp at 138.

28/ Id. at 225-34.

29/ See 47 U.S.C. §§533(b) (repealed). More recently local exchange carriers have been allowed to provide cable television so long as they do not buy out the incumbent cable operator. See id. at §572.

marketplace. It would have the cost of reducing the pool of potential Internet vendors by the number of loop owners subject to the restriction (one, two or whatever), but those loop owners do not necessarily have any specialized expertise by virtue of their ability to deploy and maintain plant that would outweigh the benefits of preserving an unregulated Internet marketplace with low entry barriers.

As a lesser alternative, loop owners could be required to separate their local network activities from their Internet services activities. The network company would then offer broadband paths to its own Internet company affiliate and all other ISPs. MindSpring recognizes that this approach has some similarities to the structural separation proposed in the associated NPRM regarding ILEC Advanced Services. 30/ However, we are concerned that the FCC's ILEC proposal may not adequately prevent discrimination against independent ISPs, and has other disadvantages when compared to full separation of the last mile operation.

B. Broadband Transport Services and Equal Access.

A second option is to address "Open System" goals through rules requiring high speed loop owners to sell broadband transport capacity connecting an end user premise to any ISP on an equal access-type basis. 31/ Customers should be able to reach the ISP of their choice, with no discrimination on the part of the loop owner in favor of its own ISP affiliate.

30/ See Wireline Services NPRM, Section VI.

31/ The Notice itself suggests that an equal access type solution would be a possible check on anticompetitive discrimination by loop operators. See Notice at 13, para.38.

MindSpring has recently entered into an agreement with a competitive cable company that could serve as a model for this kind of arrangement. MindSpring interconnects with a router at the cable headend, and the cable operator transports data packets over its HFC network to and from our customer's premise. MindSpring supplies and installs customer premises equipment and provides other end user Internet support. We pay the cable operator to connect to their router on a per customer basis.

Significantly, this kind of transport arrangement can be done on a non-exclusive basis. Various ISPs can attempt to win the customer, and the successful vendor can then use the transport to the customer premise.

This approach essentially consists of an unbundling of the consumer's purchase of loop facility supplier from the purchase of ISP services. The consumer may or may not have more than one broadband facility to its premise. If not, it still can reach the ISP of its choice. If so (say both an ILEC wire and a cable wire), the consumer can choose which wire he or she prefers, as well as which ISP to provide services over that wire. 32/

Unfortunately, MindSpring does not anticipate that most last mile companies will voluntarily accommodate unaffiliated ISPs in this fashion. Absent regulatory requirements, they may refuse to sell transport -- or else offer transport

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32/ It is not necessarily important whether the selected ISP contracts with the last mile owner and pays for the loop to reach the end user, or the end user buys the loop to reach the ISP. Either way the last mile owner would be compensated for the transport it provides.

only on competitively unreasonable terms and conditions. Consequently, the Commission and other policymakers would need to consider how to ensure that a transport-based option actually preserves diversity of supply options for consumers. 33/

C. Unbundled Network Elements.

MindSpring agrees with the Commission that CLECs must be able to create local broadband services using ILEC network elements. Thus, CLECs must be able to purchase the functionality of high speed packet data transport from the customer's premise to a central office or other point of interconnection, as well as the ability to switch and transport that data, just as they acquire the functionality of a narrowband loop, switching or shared transport today. 34/ This matter presents serious issues that are more within the scope of the associated Advanced Services rulemaking and can be addressed there.

MindSpring also agrees that consideration should be given to harmonizing the regulatory treatment of non-ILEC firms to the extent of requiring them to provide broadband network functionality. We understand that technical distinctions between the telephone network and the cable network may complicate this solution. However, it is worthy of further analysis in the interest of promoting

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33/ The more difficult it is to prevent discrimination here, the more attractive it would become to fully separate the loop owner from the ISP market.

34/ CLECs also should be allowed to purchase the use of physical sub-elements of the ILEC network, but the most useful element will be the transport functionality at the customer premise to central office level.

competition in advanced services, particularly insofar as the cable plant proves more suitable for the provision of broadband services to residential premises.

MindSpring also supports the Commission's consideration of whether to allow non-CLECs to buy network elements for the provision of services like Internet access, as proposed in the pending Computer III rulemaking proceeding. 35/ However, we are concerned that the UNE approach alone is unlikely to be sufficient to preserve "Open Systems" goals (even leaving aside legal questions regarding the availability of this avenue under the Telecom Act today). ISPs are not necessarily in the best position to assemble, manage, and operate last mile facilities networks using UNEs or otherwise. The Commission should be careful not to rely on a regulatory policy that makes local loop operation a practical requirement to the provision of competitive ISP services. This could prove to be a significant (and unnecessary) barrier to entry and competition.

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MindSpring believes that some combination of these tools, and perhaps others still to be identified, must be adopted to ensure that broadband loops connect consumers to an "Open System World." Again, we are not prejudging what the best overall solution should be. Nor are we suggesting that all categories of loop owner must necessarily be subject to the same policies. These matters should be resolved based on further consideration of technical and market issues.

35/ See Computer III Further Remand Proceedings, Bell Operating Company Provision of Enhanced Services, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6091 (1998).

That said, however, we are convinced that Commission actions are necessary to preserve "Open Systems" for the universe of current (and future) ISPs and other innovative competitors as local loops evolve from narrowband to broadband. And we are convinced that modest actions now will avoid the need for much more intrusive regulation in the future -- regulation that otherwise would be required to deal with the market power of last mile owners. Absent strong steps now, last mile owners will have market power over not just last mile facilities, but the whole Internet services sector.

CONCLUSION

MindSpring again congratulates the Commission on the thoughtfulness of the Notice of Inquiry here. The Commission has recognized that broadband packet technology is likely to cause profound changes to all levels of society. We look forward to helping assure that those changes lead to more competition and more diversity in services and information, rather than a concentration of power at the local loop. We are confident that if the Commission places "Open System" goals first, it will succeed in meeting Section 706's mandate of "promoting competition in the telecommunications market" for "all Americans."

Respectfully submitted,

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September 14, 1998

CERTIFICATE OF SERVICE

I, Patricia A. Green, hereby certify that on this 14th day of September, 1998, copies of the Comments of Mindspring Enterprises, Inc. filed in CC Docket No. 98-146 were hand delivered to the parties listed below.

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